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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 30

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 1, 1953
CERTIORARI GRANTED JUNE 1, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1]

IN UNITED STATES COURT OF CLAIMS

LOUIS LOBER, CHARLES LOBER and ALMA T. LOBER, as executors of the last will and testament of Morris Lober, deceased, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed August 26, 1949

To the Chief Judge and Associate Judges of the United States Court of Claims:

The plaintiffs, Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, by their attorneys, Ehrich, Royall, Wheeler & Holland, respectfully show to this Court:

1. That Morris Lober, the decedent above named, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942, his will was duly probated and letters testamentary issued by the Surrogate's Court, Westchester County, New York on the 6th day of February, 1943 to your petitioners and to Max Lober.

2. That said Max Lober died on the 7th day of October, 1946.

3. That plaintiffs and said Max Lober acted as executors of the will of said decedent from the 6th day of February, 1943 to the 7th day of October, 1946 and plaintiffs have ever since the 7th day of October, 1946 continued to act and are now acting as surviving executors of said will.

[fol. 2] 4. That said decedent on or about and under date of October 31, 1924, by instrument in writing, set up a trust for the benefit of his son, Robert T. Lober consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company of a market value on said day of approximately $4,200.00, a true copy of which instrument is annexed hereto as Exhibit A and made a part hereof as if fully set forth in this paragraph.

5. That said decedent on or about and under date of March 15, 1929, by instrument in writing, set up a separate

trust for the benefit of his son, James Morris Lober consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank of a market value on said date of approximately $22,575.00, a true copy of which instrument is annexed hereto as Exhibit B and made a part hereof as if fully set forth in this paragraph.

6. That said decedent on or about and under date of March 18, 1929, by instrument in writing, set up a separate trust for the benefit of his daughter, Maxine Lober consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929 and of a market value on said date of approximately $13,350.00 and cash transferred on or about March 27, 1929 in the amount of $2,709.00, a true copy of which instrument is annexed hereto as Exhibit C and made a part hereof as if fully set forth in this paragraph.

7. That on or about and under date of August 27, 1934, said decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 4, 5 and 6 of this petition had been duly constituted and had been and was irrevocable, true copies of which three instruments are annexed hereto attached to Exhibits A, B and C and are made part hereof as if fully set forth in this paragraph.

8. That said transfers referred to in paragraphs 4, 5 and 6 of this petition were completed gifts according to the terms of said trust instruments, Exhibits A, B and C hereof, and the principal of said trusts were vested respec-[fol. 3] tively in said Robert T. Lober, James Morris Lober and Maxine Lober.

9. That said Robert T. Lober was born January 11, 1922 said James Morris Lober was born February 7, 1929 and said Maxine Lober was born February 7, 1929; that said three persons constituted at the several times said trusts were set up and at all times subsequent thereto all the children of decedent Morris Lober; and that said three persons all survived said decedent.

10. That at the several times of creation of said three trusts and on August 27, 1934, said decedent Morris Lober enjoyed good health, had ample financial means other than the assets transferred to said trusts and had as his purpose in setting up said trusts the proper education and

training of his children in the management and use of money and property and to provide separate capital funds which each of them could rely on having available at the age of 25 for such purposes as each such child desired separate funds.

11. That said transfers effected by setting up said trusts were not made in contemplation of death, were not part of said decedent's testamentary plan and were not properly includible in the estate of said decedent for estate tax purposes.

12. That the true and correct net estate of said decedent before the statutory exemptions was $660,749.17.

13. That the testamentary plan of said decedent is set forth in his will dated and executed November 24, 1936, a true copy of which instrument is annexed hereto as Exhibit D and made a part hereof as if fully set forth in this paragraph.

14. That the Internal Revenue Agent in Charge of the Upper New York Division of the Internal Revenue Service valued the assets of said three trusts as of December 13, 1942 at $128,139.67 and improperly included in the estate of said decedent the assets of said three trusts in such amount although no part thereof was properly includible as an asset taxable in said decedent's estate.

[fol. 4] 15. That on or about and under date of January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

16. That on or about February 19, 1947, plaintiffs as such executors were wrongfully required to and did pay to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, which sum included estate taxes in the amount of $39,012.19 improperly assessed by inclusion of the assets of said three trusts plus interest thereon up to February 19, 1947 in the amount of $6,865.62.

17. That on or about and under date of April 23, 1947, plaintiff, Louis Lober, as executor of the will of said de-

cedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 improperly assessed and collected as aforesaid and interest improperly claimed and collected thereon up to February 19, 1947 in the amount of $6,865.62 or a total of $45,877.81.

18. That on or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

19. That the whole of said sum of $45,877.81 has been ever since February 19, 1947 and now is wrongfully and unlawfully retained and withheld from the plaintiffs as such executors and against their will by the United States of America.

20. That no other action than aforesaid has been had on this claim in Congress or by any of the Departments; that plaintiffs and said decedent and the beneficiaries under his will have at all times borne true allegiance to the Government of the United States of America and they have [fol. 5] not in any way voluntarily aided, abetted or given encouragement to rebellion against such Government; that plaintiffs, as such executors, always have been and are the sole and absolute owners of the claim herein presented and have made no transfer or assignment of said claim or of any part thereof or of any interest therein; that they are justly entitled to the amount claimed from the United States of America after allowing all just credits and setoffs; that this claim is founded upon the laws of the United States relating to internal revenue, to wit: the Revenue Act of 1926 as amended and the Revenue Act of 1932 as amended, particularly the sections of said Acts relating to federal estate tax, being sections 300-325 of the Revenue Act of 1926 and sections 401-403 of the Revenue Act of 1932; that this suit is filed under section 1491 of Title 28 of the United States Code entitled "Judicial Code and Judiciary" and sections 3313, 3770, 3771 and 3772 of Title 26 of the United States Code entitled "Internal Revenue Code."

21. That plaintiffs believe the facts as hereinabove stated to be true.

Wherefore, plaintiffs pray judgment against the United States of America, upon the facts and law, in the amount

of $45,877.81 with interest thereon from February 19, 1947 and their reasonable costs and disbursements herein.

Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, plaintiffs by Ehrich, Royall, Wheeler & Holland, Attorneys for plaintiffs, Office and Post Office Address, No. 20 Exchange Place, Borough of Manhattan, New York 5, New York.

James G. Holland, of counsel.

[fol. 6] EXHIBIT A TO PETITION

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my son, Robert T. Lober, upon the terms, conditions and trusts hereinafter set forth, the property, securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said Robert T. Lober, or until he shall have reached the age of twenty-five years, the net income so collected to be never at any time either in whole or in part expended for the maintenance, education and support of said Robert T. Lober during his minority, but accumulated for his benefit in whole or in part, as the Trustee may deem proper, such accumulations of income, if any, to be paid over to said Robert T. Lober upon his reaching his majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said Robert

T. Lober when he shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said Robert T. Lober from the principal of the Trust Estate, and the amount and time of such payments shall rest in the discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

[fol. 7] The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts

necessary for the exercise of the same and to take advantage thereof.

Whenever any corporation shall declare and pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock [fol. 8] so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trustees, with limitations as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said Robert T. Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper. This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud.

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 9] In witness whereof, this instrument has been executed this 31st day of October 1924.

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 31 day of Oct. 1924 before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan Cahen, Notary Public N. Y. Co., No. 419—3/30/25.

[fol. 10] Schedule of Property, Securities and/or Assets Oct. 31, 1924

Cash $742.02

75 Importers and Exporters Insurance Co.

[fol. 11] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about *about* the 31st day of October, 1924, enter into a Trust Agreement with myself as Trustee, for the benefit of my son Robert T. Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August, 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August, 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 12] EXHIBIT B TO PETITION

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my son, James Morris Lober upon the terms, conditions and trusts hereinafter set forth, the property securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said James Morris Lober, or until he shall have reached the age of twenty-five years, the net income so collected shall at no time be expended either in whole or in part for the maintenance and support of said James Morris Lober during his minority, but that the donor shall continue to discharge his obligations to his minor son from his own personal funds. The Trustee may in his judgment either accumulate or reinvest the income, if any, the balance to be paid over to said James Morris Lober upon his reaching majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said James Morris Lober when he shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said James Morris Lober from the principal of the Trust Estate, and the amount and time of such payments shall rest in the [fol. 13] discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or

otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith with any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts necessary for the exercise of the same and to take advantage thereof.

[fol. 14] Whenever any corporation shall declare and pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trus-

tees, with limitation as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said James Morris Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper. This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud,

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 15] In witness whereof, this instrument has been executed this 15 day of March 1929

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 15 day of Mar. before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan R. Cahen (LS), Notary Public N. Y. Co.
No. 7, 3/30/29.

[fol. 16] Schedule of Property, Securities and/or Assets March 15, 1929

Cash	$1325.50
25 National Park Bank bought @ 902	22575.00

[fol. 17] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about the 15th day of March, 1929, enter into a Trust Agreement with myself as Trustee, for the benefit of my son James Morris Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August, 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 18] Exhibit C to Petition

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration-, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my daughter, Maxine Lober upon the terms, conditions and trusts hereinafter set forth, the

property securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said Maxine Lober, or until she shall have reached the age of twenty-five years, the net income so collected shall at no time be expended either in whole or in part for the maintenance and support of said Maxine Lober during her minority, but that the donor shall continue to discharge his obligations to his minor daughter from his own personal funds. The Trustee may in his judgment either accumulate or reinvest the income, if any, the balance to be paid over to said Maxine Lober upon her reaching her majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said Maxine Lober when she shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said Maxine Lober from the principal of the Trust Estate, and [fol. 19] the amount and time of such payment shall rest in the discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith with any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the

property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts necessary for the exercise of the same and to take advantage thereof.

[fol. 20] Whenever any corporation shall declare any pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trustees, with limitations as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said Maxine Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper.

This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud.

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 21] In witness whereof, this instrument has been executed this 18 day of March 1929

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 18th day of Mar. before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan R. Cahen (LS), Notary Public N. Y. Co. No. 7, 3/30/29.

[fol. 22] Schedule of Property, Securities and/or Assets March 18th, 1929

Bought 50 Public Natl. Bank @ 267	$13,350.00
March 27th, 1929	
Cash	2,709.00

[fol. 23] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about the 18th day of March, 1929, enter into a

Trust Agreement with myself as Trustee, for the benefit of my daughter Maxine Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 24] Exhibit D to Petition

I, Morris Lober, of the County of Westchester, State of New York, do hereby make, publish and declare this to be my last will and testament, hereby revoking all other wills and codicils thereto by me at any time heretofore made.

First: I give and bequeath all my jewelry, silverware, plated ware, china, ornaments, bric-a-brac, books, pictures, paintings, engravings, household furniture, automobiles, clothing and other chattels to my wife Alma T. Lober.

If my wife does not survive me, I give and bequeath such part of the chattels hereinabove mentioned as my executors shall deem meet and proper to my children, to be distributed among them in such shares and proportions as my executors shall deem just, and the residue thereof shall fall into and become part of my residuary estate.

Second: I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of every kind, nature and description whatsoever, and where-

soever situate, to my trustees hereinafter named, to have and to hold the same to them and to their survivor and to their successors for the uses and purposes next hereinafter set forth:

a. To divide the same into as many equal shares as I may leave children me surviving and children that shall have died before me leaving issue me surviving, plus one additional share for my wife if she survives me.

b. To invest and reinvest the principal of each share, and to collect the income and to pay therefrom all the expenses of the management thereof that may lawfully be charged against income.

c. To set apart one such share for my wife and to pay the net income thereof to her during the term of her natural life or as long as she remains my widow, and upon the death [fol. 25] or remarriage of my wife, whichever event shall first occur (hereinafter called "the event of termination"), to divide the principal thereof into as many sub-shares as I leave children living at the event of termination and children that shall have died before the event of termination leaving descendants surviving the event of termination, and to add one such sub-share to each share then held in trust for the benefit of one of my surviving children upon the terms and conditions next hereinafter set forth, and to pay over and divide one such sub-share in equal parts *per stirpes* to and among the then surviving descendants of each child that shall have died before the event of termination leaving descendants surviving the event of termination.

d. To set apart for each child of mine me surviving one of the shares mentioned and described in sub-paragraph a. of this Second paragraph of my will, and until the child for whom such share is set apart attains the age of twenty-five years to pay the net income thereof to my wife for her own use during her widowhood. In the event that my wife dies or remarries before such child attains the age of twenty-five years then from such death or remarriage, whichever event shall first occur, to apply the net income of such share, or such part thereof as my trustees may deem suitable, to the support and education of such child during minority, and to accumulate the balance of

such net income and to pay the same to such child at majority, and after such child attains majority to pay the net income to such child in quarterly instalments during the term of his natural life. After such child attains the age of twenty-five years, I direct my trustees, whether or not my wife is then living, and whether or not she is then my widow, to pay the net income of such share to such child in quarterly instalments during the term of his natural life, and upon his death to pay over and distribute the principal of such share to and among such persons and corporations, and in such manner and in such shares and proportions as such child may by last will and testament designate and appoint, and failing a valid and entire exer- [fol. 26] cise of such power of appointment I give, devise and bequeath the principal of such share to the issue of such child him surviving, and failing issue of such child him surviving I give, devise and bequeath the same to my issue such child surviving.

e. I give, devise and bequeath one of the shares mentioned and described in sub-paragraph a. of this Second paragraph of my will to the issue of each child of mine that shall have died before me leaving issue me surviving.

f. I direct my trustees, anything herein to the contrary notwithstanding, at any time or from time to time after any son of mine shall have attained the age of thirty years, to pay over to such son out of the principal of his share of my residuary estate such sum or sums, not exceeding the aggregate one-fourth of the then value of the principal of such share, as my wife, whether or not she is then my widow, may from time to time in writing direct, and upon the death of my wife I direct my trustees forthwith to pay over to such son, if such son has then attained the age of thirty years (and if such son has not then attained the age of thirty years then upon his attaining the age of thirty years) out of the principal of his share of my residuary estate (as increased pursuant to sub-paragraph e. by the addition of a portion of the share originally set apart for my wife) a sum equal to the amount, if any, by which the moneys previously advanced to such son as hereinabove provided fall short of one-fourth of the total principal of such share as so increased, calculating the advances previously made at the value thereof as of the

dates of the respective advances and calculating the remaining principal at the value thereof at the time of such final advancement. The judgment of my trustees as to the value of the principal of such son's share of my residuary estate shall at all times be conclusive upon all persons interested in my estate.

Third: I direct that if when any part of the principal of my estate becomes payable to any benficiary hereunder [fol. 27] such beneficiary is an infant, the principal shall vest in such infant, but payment thereof shall be deferred, and I direct my executors or trustees to hold the share of such infant and to apply (or in their discretion to pay to the person with whom such infant resides or sojourns) such part of the income and principal thereof as in their discretion they may deem necessary and proper to the support and education of such infant, and when such infant attains majority to pay over to him whatever part of such principal and any accumulated income thereof may then remain in their hands.

Fourth: All of the foregoing legacies, devises, trust funds, beneficial interests, remainders and other gifts are given free of all estate, inheritance, succession and transfer taxes, and to that end I direct my executors to pay all such taxes out of and charge the same against the principal of my residuary estate.

Fifth: My failure to make any provision for my brothers and sisters is not due to any lack of affection on my part, but is due solely to the consideration that I have in other ways already made ample provision for them.

Sixth: If my wife does not survive me, I nominate and appoint my mother-in-law Hermine E. Toch and my sister-in-law Maxine Lambert, and the survivor of them, to be the guardians of the persons and estates of my minor children. In the event that either of said guardians by reason of death, resignation, or any other cause fails or at any time during the minority of any child ceases to act as guardian, then I nominate and appoint my sister Minerva Caine to act as guardian in the place and stead of the one so ceasing or failing to act. In the event that my wife should remarry or die during the minority of any child, I authorize my trustees during the minority of such child to

pay over to my wife or to the guardians of the person of such child, or to the survivor of them, such part of the income of the share of such child as my trustees may deem suitable for his support and education, and I direct that [fol. 28] the receipt of my wife or of such guardians of the person or of their survivor shall discharge my trustees from any further liability on account of such income, and I further direct that neither my wife nor such guardians of the person shall ever be called upon to account in detail for the expenditure of such income, and that they shall in no event be required to give security for the performance of their trust hereunder.

Seventh: I authorize and direct my executors and trustees to permit any moneys or securities, credits or interest that I may at the time of my death have with or in the partnership of Lober Brothers & Co. (or with or in any other New York Stock Exchange partnership of which my brother Louis or my brother Charles may then be a member) to remain on deposit with such partnership until the same can be paid or delivered to my executors without embarrassment or inconvenience to said partnership, provided that my brother Louis or my brother Charles remains a member of said partnership, and provided further that such payment or delivery shall in no event be postponed beyond one year after my death. The interest or other compensation, if any, to be paid to my estate by such partnership shall rest in the absolute discretion of my brothers Louis and Charles or such one of them as shall be a member of such partnership. I direct that any written statement relative to the status of my account with said partnership rendered to my executors or trustees and signed by my brothers Louis and Charles Lober or by such one of them as is then a member of such partnership shall be binding and conclusive upon my said executors and trustees and upon all persons interested in my estate.

Eighth: In the event that my wife Alma T. Lober should express a desire to become a limited partner in the partnership of Lober Brothers & Co., or in any other New York Stock Exchange partnership of which I may be a member at the time of my death, I authorize and direct my executors and trustees (provided that my brother Louis [fol. 29] or my brother Charles or one of my sons is then

a member of such partnership) to lend my wife, upon her note, whatever sum (up to but not exceeding two hundred thousand dollars ($200,000.)) she may request for the purpose of enabling her to use such money as her contribution to the capital of such limited partnership. Such note shall be made at such rate of interest, or without any interest, as my wife in her uncontrolled discretion may determine. Such note shall run for a period of time co-extensive with the term of such limited partnership. I direct my executors to renew the note from time to time as the term of the limited partnership is extended. Such note need not be secured by any collateral other than an assignment by my wife to my executors and trustees of her right to receive repayment of her contribution to the capital of the limited partnership in accordance with the terms of the partnership agreement. In the event that my wife cannot or for any reason does not become a limited partner in the New York Stock Exchange partnership of which I may be a member at the time of my death, I authorize and empower my executors or trustees at the written request of my wife to lend to my brother Louis and my brother Charles or to such one of them as is then a member of such partnership, whatever sums up to but not exceeding two hundred thousand dollars ($200,000.) my wife may request, upon their or his unsecured notes bearing interest at such rate as my wife in her absolute discretion may direct. Such notes shall run for such period of time as my executors or trustees deem advisable and may be extended from time to time provided that the note shall by its terms become due and payable at any time that neither my brother Louis or my brother Charles continues to be a member of such partnership.

Ninth: I authorize my executors and trustees to retain any investments, real or personal, of which I may die possessed, or to sell and dispose of the same, and I authorize [fol. 30] my said trustees to invest and reinvest the principal of the trust funds in and by this will created, and all lawful accumulations of the income thereof, in such securities as may be permitted for the investment of trust funds by the laws and statutes of the State of New York, except that my trustees shall not make any investments in real estate mortgages made to secure the bonds of any

real estate corporation or of any individual, and provided further that except as to direct obligations of the United States of America, or obligations guaranteed as to principal and interest by the United States of America, not more than five per cent (5%) of the total amount of the trust funds shall at any one time be invested in the securities of any one state, county, municipality or district, or of any one corporation.

Tenth: I authorize and empower my executors or trustees to consent to the reorganization, consolidation, or merger of any corporation of which they may at any time hold shares of stock, bonds, notes or other obligations, or to the sale or lease of all the property of such corporation, or any part thereof, and upon such reorganization, consolidation, merger, sale or lease, to exchange the securities held by said executors or trustees for the securities issued in connection therewith, and to pay any or all assessments imposed in the course of such reorganization, consolidation or merger in respect to the securities so held by my executors or trustees, and to subscribe and pay for any securities that may be issued in connection with such reorganization, consolidation or merger, and to do any and all acts that may be necessary or desirable to effectuate such reorganization, consolidation, merger, sale or lease. I authorize and empower my executors or trustees in their discretion to exercise in respect of all shares of stock, bonds, notes, or other investments held by them, all rights, powers and privileges that may lawfully be exercised by any person owning similar property in his own right.

Eleventh: I direct my trustees not to accumulate a sinking fund to amortize or offset the amount by which the [fol. 31] cost or value of any bond, note or other redeemable security exceeds the face value or the redemption price thereof, and I expressly direct that my trustees distribute as income all the interest and dividends received on such securities.

Twelfth: I authorize my trustees to determine in their absolute discretion whether any stock dividends received by them are to be considered principal or income, unless a corporation declares stock dividends in excess of ten per cent (10%) in any calendar year, in which event all of the stock dividends declared by such corporation in that year

in excess of ten per cent (10%) must be considered principal.

Thirteenth: I authorize my trustees to carry the record title of any real estate or personal property constituting a part of any trust in the name of any nominee or nominees selected by them.

Fourteenth: I nominate and appoint my wife Alma T. Lober and my brothers Max Lober, Louis Lober and Charles Lober to be executors of this my last will and testament.

I nominate and appoint my wife Alma T. Lober and my brother Louis Lober to be trustees of the trusts herein created, and I direct them to appoint either the United State Trust Company of New York or The Chase National Bank of the City of New York to act with them as such trustees. I authorize and direct my trustees or the survivor of them from time to time as each child of mine attains the age of twenty-five years to appoint such child as an additional trustee to act with them or it as trustee of the trusts herein created. In the event that any of said trustees should fail to qualify or cease to act before my oldest child then living has attained the age of twenty-five years, I authorize and direct my surviving trustees to appoint my brother Charles Lober to act with them as trustee of the trusts herein created, and in the event that my said brother or a second one of my two trustees first above-named should fail to qualify or cease to act before my [fol. 32] oldest child then living has attained the age of twenty-five years, I authorize and direct my remaining trustees to appoint my brother Max Lober to act with them as trustees of the trusts herein created. The appointment aforesaid shall be made by instruments in writing duly acknowledged as deeds entitled to be recorded, and each trustee appointed as aforesaid shall thenceforth be competent in all things to act in the execution of the trusts herein created as fully and effectually with all the powers and authorities, both imperative and discretionary, which are herein conferred upon my original trustees.

I empower any of my trustees to delegate to his associate trustees or trustee any and all the powers, either imperative or discretionary, herein given to him and to make such

delegation by power of attorney duly acknowledged as a deed entitled to be recorded.

I direct that none of the executors or trustees herein mentioned shall in any event be called upon to give security for the performance of his duties hereunder.

In witness whereof, I have hereunto set my hand and affixed my seal this 24th day of November in the year one thousand nine hundred and thirty-six.

Morris Lober.

The foregoing instrument, consisting of 11 pages, each page bearing the signature of the Testator, was signed, subscribed, sealed, published and declared by said Testator as and for his last will and testament, in the presence of us and of each of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses the day and year last above written.

Manfred W. Ehrich residing at Long Ridge, Stamford, Conn.

Nathan R. Caine residing at 23 West 73rd Street, N. Y. City.

[fols. 33-34] General Traverse—Filed September 15, 1949

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

/s/ Theron Lamar Caudle, Assistant Attorney General.

EBD

[fol. 35] In United States Court of Claims

[Title omitted]

Stipulation of Facts—Filed April 11, 1952

It is hereby stipulated by and between the undersigned attorneys for the respective parties hereto that the following facts may be considered as true for the purposes of

this action and that the exhibits annexed hereto shall be received in evidence subject to the right of either party to introduce further evidence not inconsistent therewith.

1. This claim is founded upon the laws of the United States relating to internal revenue, particularly Sections 810, 811(c), (d) of the Internal Revenue Code.

2. The jurisdiction of the court is based on Chapter 91 of the Judicial Code (28 U. S. C. A. Section 1491). This suit is filed under Section 1491 of title 28 of the United States Code entitled Judicial Code and Judiciary and Sections 3313, 3770, 3771 and 3772 of title 26 of the United States Code entitled Internal Revenue Code.

[fol. 36] 3. Morris Lober, the decedent above named, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942.

4. The will of said decedent, dated and executed November 24, 1936, a true copy of which is attached to the petition herein as Exhibit D thereto, was duly admitted to probate and letters testamentary thereunder were duly issued by the Surrogate's Court of Westchester County of New York on the 6th day of February, 1943 to Louis Lober, Charles Lober, Alma T. Lober and Max Lober.

5. Louis Lober, Charles Lober, Alma T. Lober and Max Lober acted as executors of the will of said decedent from the 6th day of February, 1943 to the 7th day of October, 1946. Max Lober died on the 7th day of October, 1946. Since the death of said Max Lober the petitioners herein, namely, Louis Lober, Charles Lober and Alma T. Lober have continued to act and are now acting as surviving executors of said will.

6. Said decedent on October 31, 1924, by instrument in writing, created a trust for the benefit of his son, Robert T. Lober, consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company, a true copy of which instrument is annexed to the petition herein as Exhibit A thereto.

7. Said decedent on March 15, 1929, by instrument in writing, created a separate trust for the benefit of his son, James Morris Lober, consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank,

a true copy of which instrument is annexed to the petition herein as Exhibit B thereto.

8. Said decedent on March 18, 1929, by instrument in writing, created a separate trust for the benefit of his [fol. 37] daughter, Maxine Lober, consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929 and cash transferred on or about March 27, 1929 in the amount of $2,709.00, a true copy of which instrument is annexed to the petition herein as Exhibit C thereto.

9. On August 27, 1934, said decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 6, 7 and 8 hereof had been duly constituted and had been and was irrevocable, true copies of which three instruments are annexed to the petition herein immediately after Exhibits A, B and C thereto.

10. Robert T. Lober, at the time of the creation of the trust for his benefit was the only child of the decedent, Morris Lober. James Morris Lober and Maxine Lober and said Robert T. Lober constituted all the children of the decedent, Morris Lober, at the time of the creation of the trusts for the benefit of James Morris Lober and Maxine Lober. Said three persons at all times subsequent to the creation of said trusts were the only children of the decedent, Morris Lober and said three persons all survived said decedent.

11. None of said trusts referred to in pargraphs 6, 7 and 8 hereof was created by the decedent in contemplation of death.

12. On March 14, 1944, Louis Lober, as executor of the Estate of Morris Lober, deceased, paid to the Collector of Internal Revenue at Albany, New York, the amount of $93,642.56 in payment of the estate tax liability on this estate as shown in the estate tax return.

13. By letter dated June 7, 1946, the Internal Revenue Agent in Charge of the Upper New York Division notified the executors of a proposed adjustment to the estate [fol. 38] tax liability of this estate. One of such adjustments was the inclusion in the estate of the decedent of the assets of said three trusts created by the decedent, Morris

Lober, for his children. The assets of said three trusts were valued by the Internal Revenue Agent as of December 13, 1942 at $128,139.67.

14. On January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

15. On February 20, 1947, plaintiffs, as such executors, paid to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, representing the deficiency of $109,917.47, with interest of $19,343.97. A further deficiency was assessed in March 1947 in the amount of $12,166.62, representing the balance of the tentative credit for state estate taxes taken into consideration in arriving at the above-mentioned deficiency, together with interest of $2,183.16. No part of this additional deficiency has been paid by the plaintiffs to the United States or any officer or agency thereof.

16. On April 23, 1947, plaintiff, Louis Lober, as executor of the will of said decedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 assessed and collected as aforesaid and interest claimed and collected thereon up to February 19, 1947 in the amount of $6,865.62 or a total of $45,877.81. On or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

[fols. 39-40] 17. No part of the payment of $129,261.44 paid on February 20, 1947, as set forth in paragraph 15 hereof, has been refunded to the plaintiffs.

18. If the plaintiffs herein are held entitled to any refund of estate taxes, it is further agreed by the parties that such amount shall be adjusted by credit for state estate and inheritance taxes if plaintiffs establish the payment for

credit thereof in accordance with Section 813(b) of the Internal Revenue Code.

James G. Holland, Attorney for Plaintiffs. Ellis N. Slack, Acting Assistant Attorney General.

Elizabeth B. Davis, Attorney.

[fols. 41-42] On motion made therefor and allowed by the Court, plaintiffs filed their first amendment to petition, which is as follows:

IN UNITED STATES COURT OF CLAIMS

[Title omitted]

FIRST AMENDMENT TO PETITION—Filed May 1, 1952

Paragraph designated "8" of the Petition herein is amended to read as follows:

"8. That, under the laws of the State of New York, each of said trusts was complete and irrevocable at the time it was established, as set forth in paragraphs 4, 5 and 6 of this petition, and the principal of said trusts were vested respectively in said Robert T. Lober, James Morris Lober and Maxine Lober."

James G. Holland, Attorney for Plaintiffs, Office & Post Office Address, No. 20 Exchange Place, Borough of Manhattan, New York 5, New York.

[fols. 43-44] IN UNITED STATES COURT OF CLAIMS

PROCEEDINGS FOLLOWING FILING OF AMENDMENT TO PETITION

On April 16, 1952, Defendant filed a motion to have General Traverse applied to amended petition.

On May 7, 1952, the Court allowed said motion.

IN UNITED STATES COURT OF CLAIMS

ARGUMENT AND SUBMISSION OF CASE

On November 5, 1952, the case was argued and submitted on merits by Mr. David Stock for plaintiff, and by Mrs. Elizabeth B. Davis for defendant.

[fol. 45] IN UNITED STATES COURT OF CLAIMS

Mr. David Stock for the plaintiffs. Ehrich, Stock, Leighton & Holland were on the brief.

Mrs. Elizabeth B. Davis, with whom was Mr. Assistant Attorney General Charles S. Lyon, for the defendant. Mr. Andrew D. Sharpe, Special Assistant to the Attorney General, was on the brief.

OPINION—Filed December 2, 1952

MADDEN, Judge, delivered the opinion of the court:

This is a suit by the executors of Morris Lober to recover certain estate taxes which the Government collected from the estate. They claim that the taxes were computed upon assets which were not properly includible in the estate, for tax purposes. The assets in question were the subject matter of separate trusts, created by Morris Lober in 1924, for his son Robert T. Lober, and in 1929 for his son James Morris Lober and for his daughter, Maxine Lober. These beneficiaries were in early childhood when the trusts were created. Morris Lober did not die until 1942.

Each of the trusts provided that the principal of the trust should be paid over to the beneficiary when he reached the age of twenty-five. Morris Lober, who was himself the trustee of each trust, had the power, according to the trust instrument, in his discretion to accumulate any part of the income until the beneficiary came of age. Either before or after the beneficiary reached majority, the trustee could, in his discretion, pay over a part or all of the principal to the beneficiary. The trust instruments made no provision for a gift over to any one else, in case a beneficiary died before reaching twenty-five, and had not, be-

[fol. 46] fore his death, received the principal of his fund.

Our question is whether the powers which Morris Lober retained over the assets which he placed in these trusts, the power to accumulate income during the benficiaries' minority and the power to, in effect, terminate the trust in part or in whole by paying over a part or all of the principal to the beneficiary before he reached the age of twenty-five, were such elements of control as kept the assets within Morris Lober's estate, for estate tax purposes. Another question will be posed and commented on herein after.

Section 811 (d) (2) of the Internal Revenue Code provided that there should be included, for estate tax purposes, in the gross estate of a decedent, any property which the decedent had transferred in trust, where the enjoyment of the property was, at the date of the decedent's death, subject to the decedent's power to alter, amend, or revoke the trust. The Supreme Court held, in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, that the termination of a trust was covered by the words "alter, amend, or revoke." The Government urges that the decedent here had the power to terminate the trusts by paying over the trust assets to the beneficiaries at any time before they would have had to be so paid over under the terms of the trust instruments, and that therefore the assets were covered by Section 811 (d) (2) as interpreted in the *Holmes* case.

The plaintiffs distinguish the *Holmes* case, *supra*, upon the ground that there the trust instrument provided for a gift over to other persons if a primary beneficiary should not survive the fifteen year period of the trust, and had not received the principal before his death. The gifts over were to the benficiary's children, if any survived him; if none, to the beneficiary's brothers or their surviving children per stirpes; if none to the settlor's widow, if living; if not to her heirs. In the *Holmes* case, then, the settlor trustee could, by terminating the trust by the payment over of the principal before the required date, cut off the potential interests of various persons who might have received the property if it had been kept in trust and the beneficiary had died before the time when payment of the principal was mandatory.

The plaintiffs urge that in the instant case the settlor could, by the premature payment over of the principal, only cut off the chance of the heirs of the beneficiary to

[fol. 47] enjoy the property, as they would have done if the property had been kept in the trust and the beneficiary had died before reaching the age of twenty-five. We assume, for present purposes that this is true; that the beneficiary had an inheritable interest in the trust *res* so that the right to receive the principal would have passed to his estate, rather than returning to the settlor, which would seem to be the only other possible disposition of it.

In *Commissioner* v. *Holmes*, *supra*, the Supreme Court said:

> It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811 (d) (2) requires in order to avoid the tax.

This reasoning seems to us to be conclusive of the instant case. The power of the settlor to pay over the principal was, in truth, the power to determine whether the beneficiary should, or should not, have the enjoyment of the property. As the Supreme Court said, it was not a mere question of acceleration of payment, of whether he should enjoy the property sooner or later, but whether he should enjoy it at all, or not. The identification of a living person with his heirs, as in the Rule in Shelley's Case, or the doctrine of worthier title, has no doubt served some purpose in our land law. But for the practical purpose of determining whether the creator of a trust has retained enough of the incidents of ownership or control to make

it probable that Congress intended to tax the trust *res* as a part of his estate, such an identification lacks reality. A father who has the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, [fol. 48] or to decide that he shall not have them at all for any of these purposes, but that his creditors, his children, wife, or collateral relatives should have them, has a significant control over the assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner* v. *Holmes*.

We have reached the above conclusion upon the assumption that the beneficiaries had vested interests which would have descended to their heirs had they died before reaching the age of twenty-five. The Government urges that they did not have vested interests, and that the assets would in that case have reverted to the settlor by reason of the failure of the trust. If the Government is right, the trust property was clearly includible in the taxable estate of the settlor. The question is, of course, a question of New York law, and we are uncertain of the answer. Since we have decided the case on another ground, it is not necessary for us to answer the question.

The case of *Hays' Estate* v. *Commissioner*, 181 Fed. 2d 169, involved substantially the same question as the instant case and the United States Court of Appeals for the Fifth Circuit decided that the assets were not includible in the decedent's taxable estate. We regret that we are unable to agree with that decision.

The plaintiffs' petition will be dismissed.

It is so ordered.

Howell, Judge; Whitaker, Judge; and Littleton, Judge; concur.

Jones, Chief Judge, dissenting in part:

I would not decide this case on the basis stated in the majority opinion. I do not believe the settlor retained the substantial control contemplated by the statute.

If under the New York law, in the event of the death of a beneficiary, the property would revert to the settlor rather than be distributed to the heirs of the deceased bene-

ficiary, the petition should be dismissed; otherwise plaintiff should be allowed to recover.

Finding of Fact

The court makes findings of fact based upon the facts as stipulated by the parties, the briefs and argument of counsel, as follows:

[fol. 49] 1. Morris Lober, the decedent, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942.

2. The will of the decedent, dated and executed November 24, 1936, a true copy of which is attached to the petition herein as Exhibit D thereto, was duly admitted to probate and letters testamentary thereunder were duly issued by the Surrogate's Court of Westchester County, New York, on the 6th day of February, 1943, to Louis Lober, Charles Lober, Alma T. Lober and Max Lober.

3. Louis Lober, Charles Lober, Alma T. Lober and Max Lober acted as executors of the will of said decedent from the 6th day of February 1943 to the 7th day of October 1946. Max Lober died on the 7th day of October 1946. Since the death of said Max Lober the petitioners herein, namely, Louis Lober, Charles Lober and Alma T. Lober have continued to act and are now acting as surviving executors of said will.

4. Decedent on October 31, 1924, by instrument in writing, created a trust for the benefit of his son, Robert T. Lober, consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company, a true copy of which instrument is annexed to the petition herein as Exhibit A thereto.

5. Decedent on March 15, 1929, by instrument in writing, created a separate trust for the benefit of his son, James Morris Lober, consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank, a true copy of which instrument is annexed to the petition herein as Exhibit B thereto.

6. Decedent on March 18, 1929, by instrument in writing, created a separate trust for the benefit of his daughter, Maxine Lober, consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929, and

cash transferred on or about March 27, 1929, in the amount of $2,709.00, a true copy of which instrument is annexed to the petition herein as Exhibit C thereto.

7. On August 27, 1934, decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 4, 5 and 6 hereof had been duly constituted and had been [fol. 50] and was irrevocable, true copies of which three instruments are annexed to the petition herein immediately after Exhibits A, B and C thereto.

8. Robert T. Lober, at the time of the creation of the trust for his benefit was the only child of the decedent, Morris Lober. James Morris Lober and Maxine Lober and said Robert T. Lober constituted all the children of the decedent, Morris Lober, at the time of the creation of the trusts for the benefit of James Morris Lober and Maxine Lober. Said three persons at all times subsequent to the creation of said trusts were the only children of the decedent, Morris Lober and said three persons all survived decedent.

9. None of said trusts referred to in paragraphs 4, 5, and 6 hereof was created by the decedent in contemplation of death.

10. On March 14, 1944, Louis Lober, as executor of the Estate of Morris Lober, deceased, paid to the Collector of Internal Revenue at Albany, New York, the amount of $93,642.56 in payment of the estate tax liability on this estate as shown in the estate tax return.

11. By letter dated June 7, 1946, the Internal Revenue Agent in Charge of the Upper New York Division notified the executors of a proposed adjustment to the estate tax liability of this estate. One of such adjustments was the inclusion in the estate of the decedent of the assets of the three trusts created by the decedent, Morris Lober, for his children. The assets of the three trusts were valued by the Internal Revenue Agent as of December 13, 1942 at $128,139.67.

12. On January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also

from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

13. On February 20, 1947, plaintiffs, as such executors, paid to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, representing the deficiency of $109,917.47, with interest of $19,343.97. A further deficiency [fols. 51-52] was assessed in March 1947 in the amount of $12,166.62, representing the balance of the tentative credit for state estate taxes taken into consideration in arriving at the above-mentioned deficiency, together with interest of $2,183.16. No part of this additional deficiency has been paid by the plaintiffs to the United States or any officer or agency thereof.

14. On April 23, 1947, plaintiff, Louis Loher, as executor of the will of said decedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 assessed and collected as aforesaid and interest claimed and collected thereon up to February 19, 1947, in the amount of $6,865.62 or a total of $45,877.81. On or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected the claim for refund in its entirety.

15. No part of the payment of $129,261.44 paid on February 20, 1947, as set forth in paragraph 13 hereof, has been refunded to the plaintiffs.

16. If the plaintiffs herein are held entitled to any refund of estate taxes, the parties have agreed that such amount shall be adjusted by credit for state estate and inheritance taxes if plaintiffs establish the payment for credit thereof in accordance with Section 813 (b) of the Internal Revenue Code.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that, as a matter of law, the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

[fols. 53-54] In United States Court of Claims

Judgment of the Court—December 2, 1952

Upon the findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover.

It is therefore adjudged and ordered that the plaintiffs' petition be and the same is hereby dismissed.

[fols. 55-56] In United States Court of Claims

Proceedings After Entry of Judgment

On December 31, 1952, the plaintiffs filed a motion for rehearing.

On February 3, 1953, the court entered the following order on said motion:

Order

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this court and, on consideration thereof,

It is ordered this third day of February, 1953, that said motions be and the same are overruled as follows:

49290 Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased. Plaintiff's motion for rehearing.

By the Court, /s/ Marvin Jones, Chief Judge.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 695

LOUIS LOBER, et al., as Executors of the Last Will and Testament of Morris Lober, Deceased, Petitioners,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1953

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2264)